No. 709.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

A. M. ANDERSON, Receiver of NATIONAL BANK OF KENTUCKY, - - - Petitioner,

versus

GENERAL AMERICAN LIFE INSURANCE COMPANY.

On petition for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF OPPOSING A WRIT OF CERTIORARI.

1. Four of "The Questions Presented" [Nos. 1, 2, 3 and 4] are fictitious.
2. Question No. 5 legitimately arises on the Record, but it does not call for *certiorari*.
3. Petitioner's "Summary Statement" of facts is largely imaginary; and it is without support in the Record.
4. The issue in this litigation was *one of fact*, on which both the District Court and the C. C. A. agreed.

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FIRST POINT: Questions Nos. 1, 2, 3 and 4 are wholly fictitious, in that the alleged facts therein recited never existed.

1. Questions Nos. 1, 2 and 3 recite facts which the District Court and the C. C. A. found were *non-existent.*

2. Question No. 4 is a fictitious question, as the C. C. A. pointed out that the language relied on by the Petitioner related to an *entirely different subject* from that to which Petitioner attempted to apply it 12–15

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Supreme Court of the United States

October Term 1944.

No. _____

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY, - - - *Petitioner,*

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY.

BRIEF OPPOSING A WRIT OF CERTIORARI.

The petition for *certiorari* should be denied for two reasons:

FIRST: No question of law is involved.
SECOND: Only a *question of fact* is involved.

Four Fundamental Reasons For Denying Certiorari.

I. Of "The Questions Presented," *four* are *wholly fictitious;* in that the alleged facts recited in those Questions simply *never existed*—and both the District Court and the C. C. A. expressly so found (Findings of Fact Nos. 21-22, I R. 137-138; C. C. A.'s Opinion I R. 165, 170-171, 173-174, 185).

Questions Nos. 1, 2 and 3 will be considered at p. 12-13, *infra;* and Question No. 4 at p. 13-15, *infra.*

II. Question No. 5 (*re* allowance of "Interest" on delayed dividends) is a *legitimate question* properly arising on the record; but it does not call for *certiorari;* in that Petitioner does not even claim (1) that it is a novel question; or (2) that there is any *conflict* (*a*) between State and Federal Courts, or (*b*) between two C. C. A.'s;[1] or (*c*) between this Court and any other court (see petition, p. 4, 20-21, 34-35); *whereas,* the C. C. A. decision *followed precisely* both the ancient [1890] and recent [1938] decisions of this Court (*Armstrong* v. *American Exchange National Bank,* 133 U. S. 433, 470, and *Ticonic National Bank* v. *Sprague,* 303 U. S. 406, 411), the decisions of the C. C. A. (6th, 8th, 9th),[2] and the text-writers (I R. 184-188).[3]

Indeed, the C. C. A. actually *disapproved a dictum* in one of its own prior decisions (*First National Bank* v. *Bell,* 97 F. 2d 683, 685),

> "as in conflict with the controlling cases, *Armstrong* v. *American Exchange Nat. Bank, Ticonic National Bank* v. *Sprague,* and *Chemical Nat. Bank* v. *Armstrong, supra,* which were not mentioned in that opinion" (I R. 187-8).

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[1]Petitioner (p. 19-20, 29) says that the C. C. A. is in conflict with the law as determined by the Second Circuit Court of Appeals in *Munroe* v. *Harriman,* 85 F. 2d 493. The difference is *not* in the *law,* but in the totally different Findings of Fact. Petitioner *ignores* the District Court's and the C. C. A.'s findings; and *assumes the facts* to be the same in both cases—which is simply not true (I. R. 178-179).

[2]*Chemical Nat. Bank* v. *Armstrong* (C. C. A. 6), 59 Fed. 372, 382-385; on rehearing 65 Fed. 573, 576-577; *Mothersead* v. *U. S. F. & G. Co.,* 22 F. 2d 644, 653-4 (C. C. A. 8); *Dunnagan* v. *Best,* 59 F. 2d 795, 796-7; *Douglas* v. *Thurston County,* 86 F. 2d 899, 910 (C. C. A. 9); *American Surety Co.* v. *Bethlehem Nat. Bank,* 33 F. Supp. 722, 724; s. c. 116 F. 2d 75, 77, 314 U. S. 314.

[3]7 Amer. Juris., p. 537, §746; 9 C. J. Secundum, p. 1324-5.

In the light of such a well-settled rule of law [*i. e.*, to allow interest on delayed payment of dividends declared to depositors] established in those cases, Question No. 5 does not present any ground for granting *certiorari* (p. 15-16, *infra*).

III. Petitioner's nine-page "Summary Statement"[4] is principally a *fictitious recital of facts,* containing:

> FIRST: *One hundred and thirteen lines* in quotation marks—about 4-1/3 pages, or nearly one-half of the "Summary Statement."

Not a line of that quoted matter is in evidence, or in the Findings of Fact. They are all purely *imaginary* statements. The 113 lines were lifted bodily from the Receiver's *unsworn* "Answer" and his counsel's *unsworn* "Opening Statement" at the first trial,[5] as paraphrased in the C. C. A.'s opinion on the first appeal (69 F. 2d 794)!—and are not supported by a word of testimony.

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[4]On which he rests Questions Nos. 1, 2, 3 and 4.

[5]Where *no testimony* was heard. After the Receiver's counsel made his "Opening Statement" of defense and incorporated therein by reference the "Answer," the District Court (Cochran J) rendered a $503,541.66 judgment against the Receiver (I R. 42, 51, 55, 56, 81, 160, 174). C. C. A. *reversed* it on the ground that "the allegations in the pleading [Answer] and the statement of counsel" if they remained "unchallenged or surviving destruction by adverse proofs, fully demonstrates that the corporate will of Missouri State Life was exercised only by Caldwell, or at his bidding" (I R. 84, 86). C. C. A. remanded the case as "*one of fact* upon all the evidence"; with "an *issue of fact* for the judge to decide in respect to it"; and "for trial, with appropriate *findings of fact* and conclusions of law, based upon the evidence (I R. 87, 88; *Cf.* 161, 174).

SECOND: About *one hundred and eighty lines* containing (*a*) scattered quotations from the *adverse* opinions of the District Court and C. C. A. [say 80 lines] which do not establish any *facts;* and (*b*) some references to, or quotations from, the record [say 100 lines] relating to isolated incidents, with no intelligible explanation of their relevancy or connection with the issues—and completely *omitting* the Findings of Fact, and the mass of testimony in support thereof. Those 180 lines [scattered haphazard through 10 pages of the petition, p. 5-14] are *unintelligible* as any "Statement of Facts" in this controversy.

On the second trial, both the District Court (SWINFORD J.) and C. C. A. found, *as a fact,* that there was *no basis* for any of those 113 lines of alleged "facts" "best described," etc. (petition, p. 5, 6, 8, 9, 10), as follows (Findings of Fact No. 22, I R. 138; adopted by C. C. A. I R. 165, 173-4):

Findings of Fact I R. 124-138

"22. The defendant, Receiver of National Bank of Kentucky, did not establish by evidence the material or substantial allegations in his Answer or the Opening Statement of his counsel on July 20, 1932, upon the basis of which the Circuit Court of Appeals in *Anderson* v. *Missouri State Life,* 69 Fed. (2d) 794, reversed the original judgment herein."

What is the use of this Court seriously considering Petitioner's alleged "Questions Presented" [Nos. 1-4]

when the "material or substantial allegations" in his "Summary Statement" [on which the "Questions" are predicated] are condemned by both the District Court and the C. C. A. as "not established by evidence"?—particularly when Petitioner does not cite any Findings of Fact, or references to the Record, to sustain the facts incorporated in Questions Nos. 1, 2, 3 and 4.

IV. The only question in this litigation was *one of fact,* to-wit, was Rogers Caldwell Missouri State Life's *alter ego,* or its "sole actor"?—so that "the corporate will of Missouri State Life was exercised only by Caldwell or at his bidding."[6] On the first appeal[7] the C. C. A. specifically said that the case was "*one of fact* upon all the evidence"; with "an *issue of fact* for the judge to decide in respect to it"; and that,

> "the case must be remanded for trial, with appropriate *findings of fact* and conclusions of law, based upon the evidence."[8]

On the 30-day second trial there were 21 witnesses, 1,807 printed pages of testimony, and 508 Exhibits aggregating probably 20,000 to 40,000 pages.[9]

The District Court made a careful 15-page chronological Findings of Fact (I R. 124-138). The C. C. A.

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[6]C. C. A. I R. 86-87; District Court I R. 117-8, 124; C. C. A. I R. 163, 170-171, 184.

[7]Where there was no testimony at all (I R. 81).

[8]I R. 87-88.

[9]As this Court may see by examining a huge wooden box in the Clerk's office which contains only a part of the total Exhibits.

"after careful examination of the record, consisting of four printed volumes, aggregating 1,747 pages of which 330 pages are exhibits" *adopted*[10] the findings as "*determinative findings of fact,* supported by substantial evidence and not deemed clearly erroneous"; and *emphasized* "the binding effect here of the findings of fact" (I R. 164, 165, 173-4).

Petitioner never disputes the Findings of Fact; and yet his entire petition and Brief are based on a *totally different assumption of facts,* for which there is no support in the record.

Certiorari should be *denied* (if for no other reason) on the ground that this Court is not going to re-examine an enormous record in order to *overthrow* Findings of Fact of the District Court and of the C. C. A., which the Petitioner never once attacks or criticizes, but merely *ignores,* and then blindly asserts that the facts are *otherwise*—but without showing how, or why, except by his *ipse dixit.*

Summary Statement of the Matter Involved.[11]

National Bank of Kentucky issued its $500,000 *negotiable* Certificates of Deposit to Caldwell & Co., which sold them to Missouri State Life for $500,000 cash (F. Nos. 9, 10, 14; I R. 127-129, 134).

---

[10] With the qualification (*a*) that in Finding No. 17 one affirmative phrase was "too strong in expression" but did "not differ in legal effect"; and (*b*) that there was an "overstatement" in one expression (presumably in Finding No. 21) [I R. 170-171] —neither qualification being of any importance in the result.

[11] F. stands for the District Court's Findings of Fact, approved by the C. C. A.

Missouri State Life sent the negotiable Certificates to the Bank, which re-issued them, payable directly to Missouri State Life (F. Nos. 13, 14; I R. 133, 134).

The Bank failed; a Receiver took charge; and Missouri State Life fully proved its claim on the unpaid $500,000 Certificates of Deposit (F. No. 23; I R. 138).

The Receiver paid dividends of 67% and 10%, respectively, to all creditors, *except* Missouri State Life, whose claim the Receiver denied, and refused to pay any dividend thereon (*Id.*).

Missouri State Life sued the Receiver, who defended upon the ground that Rogers Caldwell [a Director in Missouri State Life], and the Bank acting through Mr. Brown, President, and Mr. Jones, Vice President, of the Bank] made an oral "side-agreement" that the Bank "would be under no obligation to pay the two Certificates," except in liquidation of a $500,000 note which one of Caldwell's subsidiary companies owed to the Bank (F. No. 11; I R. 129; C. C. A.'s Opinion, I R. 165; *Cf.* Receiver's "Opening Statement" on First Trial, I R. 41, 42, 43).

At the First Trial, without the introduction of any testimony,[12] the District Court gave a judgment against the Receiver (1) for $503,541.66, with 6% interest until paid; and (2) for a dividend of 67% of the judgment, and all future dividends declared in favor of depositors, with 6% interest on such dividends (I R. 71). The Receiver appealed.

The C. C. A. reversed the judgment, on the ground that the Receiver's "Answer," and his counsel's

[12]See p. 3, note[5], *supra*.

"Opening Statement" constituted an offer of proof (1) that Caldwell and Missouri State Life were perpetrating a fraud on the Bank; and (2) that Caldwell was the *alter ego* and "sole actor" of Missouri State Life, which was bound by Caldwell's knowledge and oral "side-agreement" (I R. 84-86).

The C. C. A. remanded the case for findings of fact (p. 3 note[5], *supra*).

After a thirty-day Second Trial, the District Court made elaborate chronological Findings of Fact, which —so far as material here—may be briefly summarized as follows:

1. Everything Caldwell did was for his *individual* interest, and was *adverse* to Missouri State Life (of which he was a Director); and neither Missouri State Life nor any officer, agent, employe, or director (except Caldwell) knew anything of the "side-agreement" (F. Nos. 15, 17, 18; I R. 134-136).

2. Caldwell had no express, implied, or apparent authority to bind Missouri State Life by any "side-agreement" (F. No. 19; I R. 136).

3. Bank of Kentucky, its President Brown, and its Vice President Jones, knew Caldwell was fraudulently attempting to prevent Missouri State Life from collecting the Certificates of Deposit, for which it had paid $500,000 cash; the Bank, Brown, and Jones were "willing partners and instruments" to defraud Missouri State Life; and they assisted Caldwell in concealing the "side-agreement" from Missouri State Life (F. No. 19; I R. 136, 137).

4. Missouri State Life's corporate will was *not* exercised by, through, or at the bidding of, Caldwell, nor were its powers surrendered to him; and he was neither its *alter ego* nor its "sole actor" (F. Nos. 17, 21; I R. 135, 137).

5. The Receiver did not establish by evidence the material or substantial allegations of his "Answer" or "Opening Statement," upon the basis of which C. C. A. rendered its original reversing Opinion (F. No. 22; I R. 138).

The C. C. A. approved and adopted[13] all of the District Court's Findings of Fact (I R. 165, 174-175).

The District Court again rendered judgment against the Receiver for $503,541.66, as of the date of the Receivership (I R. 140), but denied it any Interest (*Id.* 140, 141).

The Receiver appealed from the $503,541.66 judgment; and Missouri State Life appealed from the denial of interest on its delayed dividends (I R. 151, 143).

C. C. A. *affirmed* the $503,541.66 judgment; *reversed* the denial of Interest; and awarded Interest upon the delayed dividends (I R. 184, 189).

The Findings of Fact, and the Opinions of the District Court and the C. C. A. are much stronger than the foregoing brief summary would indicate. They decided every question of fact and of law *against* the Receiver. The Findings of Fact and the Opinions demonstrate the *outrageous fraud* which the Bank of

[13]With a slight qualification not material here (p. 6, note[10], *supra*).

Kentucky, its President and Vice President, in conjunction with Caldwell, perpetrated upon Missouri State Life.[14]

The District Court found (Findings of Fact, I R. 137, 138; *Cf.* his Opinion I R. 117-118):

> "21. Missouri State Life's corporate will was not exercised by or through, or at the bidding of, Rogers Caldwell; but it was exercised by (1) Its own independent Board of Directors, and (2) Its own independent corporate Officers—all subject to the supervision and control of the Superintendent of Insurance of Missouri.
>
> The members of the Board of Directors and of the Executive Committee, and the administrative and executive officers of Missouri State Life, did not surrender their powers to Rogers Caldwell.
>
> Rogers Caldwell, as a representative of a large stock interest in Missouri State Life, had great power and influence in decisions and determinations by the Board of Directors in the direction of Missouri State Life's affairs; but Rogers Caldwell was by no means the *alter ego* of Missouri State Life.
>
> Bank of Kentucky, James B. Brown, and Charles F. Jones did not believe (i) that Missouri State Life's corporate will was subjugated to the will of Rogers Caldwell, (ii) that Rogers Caldwell was the *alter ego* of Missouri State Life, or (iii) that Rogers Caldwell

[14] At the time of the C. C. A.'s First Opinion (69 F. 2d 794), it was ignorant of the characteristics of Mr. Brown and Mr. Jones, concerning whom a little later (*Atherton* v. *Anderson*, 86 F. 2d 518, and 99 F. 2d 883) it found that, for many years, they had deliberately, systematically, and for the purpose of defrauding the Bank, concealed the Comptroller's Reports; fraudulently evaded his demands; fraudulently altered documents; and perpetrated deception.

The Second Trial in this case (1938) thus simply corroborated what the C. C. A. had, meanwhile, found out about Brown and Jones in other litigation.

had authority to speak for Missouri State Life, or to bind it by his oral agreement of September 4, 1930.

Bank of Kentucky, James B. Brown and Charles F. Jones knew that Rogers Caldwell was only a minority stockholder in a very large life insurance company, and they were not deceived by Rogers Caldwell, or by anyone else, into the belief that Rogers Caldwell's authority in Missouri State Life was supreme.

22. The defendant, Receiver of National Bank of Kentucky **did not establish by evidence the material or substantial allegations in his Answer or the Opening Statement of his counsel** on July 20, 1932, upon the basis of which the Circuit Court of Appeals in *Anderson* v. *Missouri State Life*, 69 Fed. 2d 794, reversed the original judgment herein."

The C. C. A. not only adopted those findings (I R. 165, 173-174[15]), but also held that Caldwell was neither an "*alter ego*" nor a "sole actor" for Missouri State Life (I R. 168, 170, 171).

No argument is needed to show that the facts recited in Questions 1, 2, and 3 were *fictions* of a vivid imagination in 1932; were disproved by the undisputed evidence in 1938; and were *rejected* by both the District Court [1942] and C. C. A. [1944].

Petitioner does not claim that those Courts were in error as to the *facts*.

Therefore, with *all the statements of fact* contained in Questions 1, 2, 3 and 4 *disproved*, the Questions are purely academic; and they have no relation whatever

[15]With the slight exception that C. C. A. thought "it is *overstatement* to say that the directors and corporate officers acted with *complete* independence in their official capacities" (I R. 171).

to the facts in this case (and to the questions properly arising thereon).

They are no ground for *certiorari*.

SUMMARY OF POINTS DISCUSSED.

1. **Questions Nos. 1, 2, 3, and 4 are wholly fictitious, in that the alleged facts therein recited never existed.**
2. **Question No. 5 does not present any question which warrants granting a *certiorari*.**
3. **This case was essentially one of fact. The District Court and the C. C. A. agreed on the facts.**

FIRST POINT.

Questions Nos. 1, 2, 3, and 4 are wholly fictitious, in that the alleged facts therein recited never existed.

Questions Nos. 1, 2, 3: All facts recited in those three Questions [and on which facts the questions are based] were "lifted" [in reverse order] almost *verbatim* from the "Opening Statement" of Receiver's counsel at the First Trial, as the following parallel columns reveal at a glance:

C. C. A.'s SUMMARY OF "OPENING STATEMENT" OF RECEIVER'S COUNSEL ON FIRST TRIAL.

[I R. 86, 87; 69 F. 2d at 798; repeated on the Second Appeal I R. 163; 141 F. 2d at 900.]

"If directors or committees abdicate, surrender their powers, and **subordinate their judgments** *and their will* **to the dominating individual,** *hermetically seal their minds to the obvious*, **permit their corporation to be used as an instrumentality of deception, unlawfulness and fraud,** pursued **over a period of years, can it be said that the corporation may escape liability because there is failure of proof of specific knowledge** of one irregular transaction, when many have been continuously engaged in? . . .

When members of a board or committee representing a corporation **surrender their powers to an individual . . . who completely dominates,** and through whom only the corporate powers are exercised, such board or committee is the sole actor, with but a single will and purpose, or else the **dominant individual** is the sole actor, and the others are to be ignored as if they did not in fact, as they do not functionally, exist. However considered the principle is the same."

PETITIONER'S "QUESTIONS PRESENTED."

[Petition, p. 3-4.]

"**3. If officers and directors** of a corporation consistently, **over a period of years, subordinate their judgment to one dominating individual and permit him to use the corporation as an instrumentality of deception, unlawfulness and fraud** in many transactions, **can it be said** in equity **that the corporation may escape responsibility** as to one of the agreements . . . **because there was a failure to prove** that the other officers and directors had **specific knowledge** of such agreement? . . .

1. Where a large corporation over a long period of time, **permits itself to be dominated** by one of its directors, a member of the Executive Committee, to such an extent **that the other members of the Committee abdicate their function,** and the officers are complaisant to every desire of a **dominant director.** . . .

2. Where a large corporation permits itself to be **dominated and controlled** to the extent set forth in the first question . . . by the **dominating official** where such dominating official had. . . ."

Question No. 4: This is an equally fictitious question. It recites [*as a fact*] that the C. C. A.'s Opinion, on the First Appeal, "establishes the law of the case" that "no interest shall be allowed" (Petition, p. 4). The C. C. A. expressly pointed out that its language on the First Appeal, upon which the Petitioner relies, (1) related only to the Receiver's liability for Interest

after the date of the Bank's receivership, and (2) did not relate "to the issue now before us *concerning the payment of interest on delayed dividends*" (C. C. A.'s italics, I R. 185).[16]

Consequently, Petitioner's "law of the case" rule is not even here for review, as the C. C. A.'s decision on the *First* Appeal related to a *totally different* "interest question" from that involved on the *Second* Appeal.[17]

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[16] *On the First Trial and First Appeal:* Judge Cochran thoughtlessly and erroneously allowed interest on the $503,541.66 judgment "until paid," thereby inadvertently allowing interest *after* the date of the receivership, which was so clearly erroneous (*White* v. *Knox*, 111 U. S. 784) that the creditor [Missouri State Life] made no attempt to sustain it in the C. C. A. on the First Appeal, and silently confessed that error which was insisted on in the Receiver's Brief (p. 51, 52).

On the other hand, the Receiver made no criticism of Judge Cochran's action in *allowing interest on delayed dividends*, because his counsel knew Judge Cochran's judgment was correct in that respect.

On the Second Trial and Second Appeal: Missouri State Life conceded that the C. C. A.'s Opinion on the First Appeal, disallowing interest *after* the date of the Receivership, was correct. (See General American's C. C. A. Brief, p. 3, 5, 7, and many cases cited following *White* v. *Knox*, 111 U. S. 784).

[17] The two different questions are:

On the First Appeal: Was interest allowable against a national bank's receiver for any time *after* the date of the receivership? The C. C. A. correctly answered "No" (I R. 88-89). That question was not involved on the Second Appeal, as no interest was allowed on the claim after the date of the receivership (I R. 140, Clause 1).

On the Second Appeal: Was interest allowable against a national bank's receiver *on declared dividends*, for the time *after* he had *declared dividends* on deposits, and had paid such dividends to all depositors, except one—where he had wrongfully refused for fourteen years to pay the declared dividends to that particular depositor? That was the only "interest question" involved on the Second Appeal; and the C. C. A. correctly answered "Yes" (I R. 185-188).

No further argument is necessary to show that Question No. 4 does not even present a question (*a*) of the "law of the case" rule; or (*b*) of the right of the C. C. A. to decide one way on the First Appeal and a different way on the Second Appeal. Such is the case because C. C. A. has expressly said that its language on the First Appeal related to the right to allow interest *after* the date of the receivership; and that such language had *no reference* to the subsequent question of the right to allow interest *on delayed dividends* which were not paid to the creditor but which ought to have been paid (I R. 184-185).

It is no ground for *certiorari.*

SECOND POINT.

Question No. 5 does not present any question which warrants granting a *certiorari.*

As fully explained at pages 2-3, *supra,* and in the C. C. A.'s Opinion (I R. 184-188), the law is settled that when a receiver (for good reasons, bad reasons, or no reasons at all) fails to pay one creditor the declared dividends to which that creditor is entitled, the receiver *must pay interest on such delayed dividends,* from the date of their declaration to the date when they are ultimately paid to the creditor (*Armstrong* v. *American Exchange National Bank,* 133 U. S. 433, 470, and *Ticonic National Bank* v. *Sprague,* 303 U. S. 406-411).

Petitioner does not claim that it is a "novel question," or that there is any *judicial conflict* on the subject (Petition, p. 20-22).

Petitioner suggests (p. 21) that because the C. C. A. disapproved a *dictum* in its prior opinion in *First National Bank* v. *Bell*, 97 F. 2d 683, *certiorari* should be granted. The C. C. A. pointed out that it disapproved its former decision in the *Bell* case in deference to the *American Exchange National Bank, Ticonic National Bank* and *Chemical National Bank* cases which it said were "controlling," and "which were not mentioned in that [*Bell*] opinion."

THIRD POINT.

This case was essentially one of fact.
The District Court and the C. C. A. agreed on the facts.

This Court should not grant *certiorari* simply to review an enormous record for the purpose of ascertaining whether the District Court and the C. C. A. should have found the facts differently from the way they were found.

The *fictitious* nature of Petitioner's "Summary Statement," its lack of support in the Record; its repudiation in advance by the District Court and the C. C. A.; and the agreement all around that the case is one for "appropriate findings of fact," has been explained in paragraph III and IV, pages 3, 5, *supra*, and need not be re-emphasized here.

If Petitioner had contended that there was *no substantial evidence to sustain* the District Court's "Findings of Fact," and had so pointed out, then this Court might, or might not, grant *certiorari* in order to decide

whether the lower courts had decided the case upon assumed facts, to sustain which there was no substantial evidence whatever.

But that is not the case here. Petitioner has made no such showing.

Consequently, unless this Court feels that it should re-examine an enormous record to decide whether the facts found below were justified, *certiorari* should be denied.

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December 26, 1944.

(31)

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Petitioner,

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF THE RECEIVER

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REPLY BRIEF OF THE RECEIVER

Respondent's brief does not deny that the first three of the questions presented are of far-reaching concern and importance involving, as they do, the effect of control of corporate bodies, committees and officials by individuals. Nor could denial be made of the importance of this problem in view of the numerous times that the questions have come up for consideration in congressional committees and in writings on the subject. Nor does respondent deny that the questions as stated by petitioner present a conflict

between the decision of the Sixth Circuit Court of Appeals and the Second Circuit Court of Appeals. It is contended, however, that the questions as stated are "fictitious" and depend upon facts not found by the lower court.

In this contention our opponents give an unfair and incorrect statement of the status of the record. The questions of fact which were presented to the lower courts were: (1) Was there a contemporaneous agreement restricting the certificates when originally issued? (2) Was there an agreement on the part of Caldwell on behalf of Missouri Life with respect to the certificates when they were issued to Missouri State Life? (3) Did Caldwell control and dominate Missouri State Life? With respect to the first two questions of fact both the District Court and the Court of Appeals agreed that there was a restrictive agreement and that Caldwell made an agreement on behalf of Missouri Life. With respect to question three the District Court and the Court of Appeals disagreed. The District Court made a finding that the officers and directors of Missouri State Life were "independent" of Caldwell and "did not surrender their powers to Rogers Caldwell." (Finding of Fact No. 21, R. 1, p. 137.) However, when the case came to the Court of Appeals after trial on the merits, that court specifically stated that with respect to this finding of fact the District Court was in error and that the same was clearly erroneous. It stated that it was adopting the findings of the District Court except "wherein we have specifically indicated to the contrary" in the narrative of the facts. [141 F. (2d) 898, 904, Col. 2, R. 1, p. 173.] On the question of control the court specifically indicated that it did not consider the finding of the District Court correct. With respect to this finding it said:

> "But we think, from reading the record, that it is overstatement to say that the directors and corporate officers acted with complete independence in their offi-

cial capacities." 141 F. (2d) 898, 903, Col. 2, R. 1, p. 170.

Having disapproved of the finding the Court of Appeals arrived at its own conclusion on the question of control. It found:

> "THE OFFICERS AND EXECUTIVE COMMITTEE MEMBERS . . . APPEARED TO HAVE BEEN COMPLAISANT IN SUBMISSION TO HIS (Caldwell's) DESIRES IN THE CONDUCT OF THE CORPORATE BUSINESS." 141 F. (2d) 898, 903, Col. 2, R. 1, p. 171. (Emphasis ours.)

and

> "HILLSMAN TAYLOR, PRESIDENT OF THE COMPANY, . . . WAS PLAINLY DOMINATED BY HIM (Rogers Caldwell)." 141 F. (2d) 898, 902, Col. 2, R. 1, p. 168. (Emphasis ours.)

and

> ". . . THE OFFICIAL FUNCTIONING OF THE BOARD WAS FAR FROM FREE AND UNTRAMMELLED TO THE POINT OF INDEPENDENCE. . . ." 141 F. (2d) 898, 903, Col. 2, R. 1, p. 171. (Emphasis ours.)

Thus we have the facts of control established by the Court of Appeals and it is no answer to the Receiver's petition for writ of certiorari to say that a question of fact is presented; that the facts are fictitious, or that there is a lengthy record. It is true that the record is voluminous, but the Receiver undertook to show by a large number of transactions that the corporate will of Missouri Life was surrendered to Caldwell. Neither the District Court nor the Court of Appeals in their consideration of the case on the merits chose to review these specific transactions, but confined themselves to discussion of the ultimate facts of control and with respect to those ultimate facts the Court

of Appeals found that Caldwell controlled the officers, the executive committee and the board of directors.[1]

The respondent unfairly states that the quotations from Judge Simons' opinion which appear in the petition for writ of certiorari are merely statements based on an opening statement which was never proved at time of trial on the merits. This is incorrect. It was the District Judge after trial on the merits who quoted Judge Simons and made the statement that

> "The manifestation of his (Caldwell's) genius and the ultimate end to which it came are best described in the words of Judge Simons. . . ." 46 F. Supp. 189, 191, R. 1, p. 107.

The District Court then quotes Judge Simons' statement of the facts of control by Caldwell of numerous corporations, and of the improper practices indulged in by him in connection with such control.

Respondent refers to finding of fact 22 which was copied verbatim by the District Court along with the other suggested findings of fact proposed by respondent.[2] A finding that the Receiver did not prove his opening statement is not a finding of fact.

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[1] The Court of Appeals in its consideration of the case on the merits did refer to one of the specific transactions, namely, the Inter-Southern deal, and said: "Undoubtedly, the committee was highly culpable in its neglect of duty in permitting the unloading of Inter-Southern Insurance Company securities on the Missouri State Life Insurance Company, for the benefit of Caldwell and Company and to the heavy financial detriment of Missouri State Life." The officers and executive committee participated in this transaction and it was formally approved by the Board of Directors (Ex. 45, Minutes of Directors, p. 145, Reproduced p. 69, approving Minutes Executive Committee of May 22, 1930—Ex. 50, p. 135, Reproduced p. 81) although the minutes which the Board of Directors approved showed on their face that the directors were approving on behalf of an insurance company purchase of mortgages of which $1,038,425.76 were in default (R. 2, p. 354, R. 3, pp. 816, 864) and payment at par for bonds which were selling for 30 cents to 80 cents of their face value. (R. 2, pp. 488, 490.)

[2] Compare Insurance Company suggested finding, R. 3, p. 1243, copied verbatim by court, R. 1, p. 138.

> "Saying that the plaintiff has sustained the burden of proof as to the designated issue in suit No. 3371, is not an adequate finding of the matters of fact involved in that issue, particularly where, as here, the subject is new and may admit of different opinions. It is in the nature of a legal conclusion rather than a finding of the underlying facts, and we think it does not adequately respond to the issue and is not sufficient to support the judgment which rests on it." *United States* v. *Jefferson Electric Company*, 291 U. S. 386, 408.

Nor can it be said that the Receiver did not establish the allegations of his answer or opening statement when the Court of Appeals has found existence of control and domination by Rogers Caldwell.

REPLY TO DISCUSSION OF INTEREST QUESTION

With respect to the two questions regarding interest respondent alleges that as to question number four, the same is "fictitious" (Respondent's brief, p. 13). It is contended that the question erroneously "recites" that the Circuit Court of Appeals on the first appeal

> ". . . established the law of the case . . . that no interest shall be allowed."

In respondent's contention that this was not so, the claim is made that the first decision

> ". . . related only to the Receiver's liability for interest after the date of the bank's receivership."

Respondent fails to advise this court that the judgment on the first appeal provided for payment of "interest on such dividends." (R. 1, p. 71.) It was from this judgment that assignments of error were taken and which was reversed

by the Court of Appeals on its first hearing pursuant to its decision holding that interest was not due on the delayed dividends. This established the law of the case. Nothing remained to be done with respect to this issue after the first decision by the Court of Appeals. The Insurance Company failed to ask this court for a review and the decision on interest became final.

With respect to the final question, it is conceded that the same arises on the record, but it is contended that it does not call for certiorari. Neither *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, nor *Armstrong* v. *American Exchange National Bank*, 133 U. S. 433, apply to the situation. The first applies solely to a case where there is sufficient collateral to pay a secured claim with interest. The second does not involve a case of two appeals and a final decision holding that interest cannot be recovered as is the case here.

CONCLUSION

Since the respondent predicates its entire opposition to the petition for writ of certiorari on the theory that the facts do not present the question, and since the facts found by the Circuit Court of Appeals in its discussion on the merits do present the question of control, and inasmuch as respondent does not deny that on the basis of those facts the matter presented is of far-reaching concern and importance and presents a conflict between two circuit courts of appeal, it is submitted that the petition for writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 709

A. M. ANDERSON, Receiver of the National Bank of Kentucky, of Louisville, *Petitioner,*

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY, *Respondent.*

BRIEF OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIAE.

JOHN F. ANDERSON,
Attorney for Preston Delano,
Comptroller of the Currency.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIAE.

Comes now Preston Delano, Comptroller of the Currency of the United States, and by leave of Court first had and obtained, respectfully submits his brief as amicus curiae, in support of the petition for writs of certiorari filed by A. M. Anderson, Receiver of the National Bank of Kentucky, of Louisville, Kentucky in the above entitled cause.

I.

Foreword.

"Citation of the Opinions Below", "Statement of Jurisdiction", "Specification of Errors", "Summary Statement of the facts", "Questions Presented" and the "Rea-

sons relied on for allowance of the writs" are covered in the petition filed by the Receiver. Reference is here made to the same to avoid repetition.

II.

Reasons urged by the Comptroller of the Currency in Support of the Receiver's Petition for Writs of Certiorari.

It appears from the Petition that: Rogers Caldwell, of Nashville, Tennessee, dominated and controlled a number of important life insurance companies and banks. Among these were the Bank of Tennessee, the Associated Life Insurance Company, the Inter-Southern Life Insurance Company, and Missouri State Life Insurance Company. The respondent, General American Life Insurance Company, is a successor, after this suit was brought, of the Missouri State Life Insurance Company. Caldwell was heavily involved, and he with nearly all of his corporate creatures collapsed in October, 1930.

On August 21, 1930 Caldwell, acting for Associated Life Company, negotiated a loan of $500,000.00 from the National Bank of Kentucky. The proceeds of the loan were utilized to purchase two certificates of deposit, $250,000.00 each, in the name of Caldwell & Company as a part of the transaction. Caldwell & Company guaranteed in writing that the certificates of deposit would not be cashed except in reduction of the Associated Life loan. Notwithstanding this guarantee, Caldwell immediately transferred the certificates of deposit to the Missouri State Life Insurance Company.

The executive committee of Missouri State Life acted for the insurance company in purchasing the certificates. Rogers Caldwell, the transferor of the certificates, was the dominant member of the executive committee. The Circuit Court of Appeals found that Rogers Caldwell controlled the officers and executive committee of Missouri State Life.

> "The officers and executive committee members * * * appear to have been complaisant in submission to his desires in the conduct of the corporate business;" 141 F. (2d) 898, 903, R. 1, page 171.

The Court of Appeals further found that the Board of Directors in its "official functioning * * * was far from free and untrammeled to the point of independence". 141 F. (2d) 903, R. 1, page 171.

Missouri State Life requested the bank to re-issue new certificates to it in lieu of the certificates issued to Caldwell & Company. The bank promptly called Caldwell's attention to this fact and on behalf of Missouri State Life he agreed that the Missouri State Life would likewise not cash the new certificates except and unless the note was paid. In reliance upon this agreement of Caldwell, without which Missouri State's request would have been refused, the new certificates were issued in the name of Missouri State Life.

A short time thereafter National Bank of Kentucky failed and Missouri State Life filed its claim with the Receiver demanding that the certificates be paid notwithstanding the fact that the Associated Life loan still remained unpaid.

The case has been twice before the Circuit Court of Appeals for the Sixth Circuit. At the first trial the District Court had directed a verdict on the opening statement of defense made by counsel for the Receiver and entered a judgment for the full amount of the claim with 6% interest. The Court of Appeals for the Sixth Circuit reversed this decision, remanded the case for a new trial, stating its legal conclusions in a long opinion, to the effect that the defense tendered was, subject to proof, a good defense; and in addition directed that in no event was interest allowable. *Anderson* v. *Missouri Life*, 69 F. (2d) 794.

Upon retrial the District Court again entered judgment for the plaintiff against the Receiver upon the sole ground

that there was a failure on the part of the Receiver to prove that the agreement of Rogers Caldwell was brought to the attention of officials of the Missouri State Life Insurance Company, other than Caldwell.

Upon the second appeal the Court of Appeals reversed its former holdings in two respects. It held that it was necessary to prove that the collateral agreement made by Caldwell was specifically brought to the attention of the other officials of Missouri State Life Insurance Company. It also reversed its previous holding on the question of interest. *Anderson* v. *General American Life Insurance Co.*, 141 F. (2d) 898.

The decision of the Sixth Circuit seems to be in direct conflict with the decision of the Second Circuit in the Harriman Bank case—*Munroe* v. *Harriman, et al.*, 85 F. (2d) 493, cert. den. 299 U. S. 601—where it was held that a national bank, if it claims by virtue of a sole actor's act, must also accept the burden of the sole actor's knowledge of the defect in the title. If a national bank is so bound it would seem that a life insurance or other corporate customer of the bank should be equally bound by the sole actor's dealing with it.

The two cases in the two circuits have parallel facts. In each:

1) There was a dominance of a corporation, one a large national bank, the other a large insurance company;

2) Securities were transferred from the dominating individual to the corporation which he controlled;

3) It was to the personal interest of the transferor to conceal from the corporation certain information he had as to the restrictions which apply to the securities;

4) The transferor controlled the officials and the committees of the two corporations;

5) The transferor used this control to cause the corporation to take over the securities;

6) Payment was made to the transferor even before approval was had by the proper committee;

7) The subsequent approval by the committee was merely perfunctory;

8) The matter before the court was only one of many questionable transactions engaged in between the dominating individual and the controlling corporation;

9) The officials were found to be complaisant in submission to the dominating influence in the conduct of the corporate business.

Nevertheless, in the Harriman case, involving a national bank, it was held by the Second Circuit Court of Appeals that the corporation was charged with knowledge and that the controlled personnel were to be ignored; and in the present case, involving an insurance company, it was held by the Sixth Circuit Court of Appeals that the corporation could not be so charged with knowledge. It is submitted that the two decisions are inconsistent.

A ruling decision on the effect of the so-called "sole actor's knowledge and commitment" would be in the public interest and of importance to this office in the administration of the affairs of insolvent National banks and in the supervision of going National banks. If an insolvent National bank, as was decided in the Harriman case, is burdened with the knowledge and commitment of a sole actor for the bank it would seem that the rule should apply equally in favor of the bank and its depositors where the sole actor is acting for a corporate customer of the bank.

III.

Conclusion.

The Comptroller of the Currency, therefore, earnestly urges this Honorable Court to grant the petition for writs of certiorari filed by the Receiver in the instant case.

Respectfully submitted,

JOHN F. ANDERSON,
Attorney for Preston Delano,
Comptroller of the Currency.